STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

LALE ROBERTS, and JOAN ROBERTS,

Plaintiffs/Appellees,

v.

KATHRYN SALMI, L.P.C. an individual, d/b/a SALMI CHRISTIAN COUNSELING,
Defendant/Appellant.

Supreme Court No. 150919

Court of Appeals No. 316068

Houghton County Circuit Court
Case No. 12-15075-NH

BRIEF ON APPEAL FOR PLAINTIFFS-APPELLEES LALE ROBERTS AND JOAN ROBERTS

*****ORAL ARGUMENT IS REQUESTED*****

The Kemp Law Firm, P.L.L.C.

ZACHARY C. KEMP (P71894)
Counsel for Plaintiffs-Appellees
212 West Highland Road, Suite 102
Highland, MI 48357
(248) 529-6849
zach@thekemplawfirm.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

STATEMENT OF QUESTION PRESENTED vii

COUNTER-STATEMENT OF FACTS 1

Underlying Facts 2

Motion for Summary Disposition and the Trial Court Decision 3

Court of Appeals' Decision 3

STANDARD OF REVIEW 5

ARGUMENT 6

A. A MENTAL HEALTH PROFESSIONAL DOES HAVE A DUTY OF CARE TO THIRD PARTIES WHO FORESEEABLY MIGHT BE HARMED BY THE MENTAL HEALTH PROFESSIONAL'S USE OF TECHNIQUES THAT CAUSE A PATIENT TO HAVE FALSE MEMORIES OF SEXUAL ABUSE 6

1.Under Michigan common-law, and public policy, Defendant owed a legal duty to Plaintiffs in her negligent treatment of their daughter 7

2. Other instances of Third-Party Liability in Professional Malpractice Cases in Michigan 22

B. WHETHER THE RECORDS ARE CONSIDERED CONFIDENTIAL HAS NOT BEEN DECIDED BY THE LOWER COURTS, AND THEREFORE IS NOT RIPE FOR APPELLATE REVIEW AND FURTHERMORE IS NOT A BAR TO PROCEEDING ON PLAINTIFFS-APPELLEES' CLAIMS 23

1. The Michigan Medical Records Access Act and HIPAA are not applicable to the records at issue in this case, and furthermore are not relevant to the determination of whether a duty exists 24

2. The Record Is Devoid of Any Reference as to Whether "K" will invoke the counselor-client privilege, and Furthermore The Privilege Could be waived in fact, or as a Public Policy Measure 26

C. A MENTAL HEALTH PROFESSIONAL'S COMMON LAW DUTIES WERE NOT ABROGATED BY THE ENACTMENT OF MCL § 330.1946, AND AS SUCH, A MENTAL HEALTH PROFESSIONAL DOES HAVE A COMMON

LAW DUTY OF CARE TO THIRD PARTIES WHO FORESEEABLY MIGHT BE HARMED DUE TO NEGLIGENT THERAPY.....28

D. DESPITE NOT BEING TIED TO THE QUESTION PRESENTED BY THIS COURT, NOR PART OF ANY CROSS-APPEAL IN THE COURT OF APPEALS, DEFENDANT'S ASSERTIONS THAT THIS IS MERELY A CLAIM FOR DERIVATIVE DAMAGES , OR FOR "ALIENATION OF AFFECTIONS" IS CLEARLY MISPLACED, AND HAS BEEN CORRECTLY DECIDED BY ALL COURTS UP TO THIS POINT..... 30

CONCLUSION AND RELIEF REQUESTED 35

INDEX OF AUTHORITIES

Cases

Althaus v Cohen, 710 A2d 1147, 1157 (Pa. Super. Ct. 1998) 13

Beaty v Hertzberg & Golden, PC, 456 Mich 247, 262; 571 NW2d 716 (1997)..... 7

Berger v Weber, 411 Mich 1 (1981).....33, 34

Bird v W.C.W., 868 S.W.2d 767, 769 (Tex. 1994). 12

Canon v Thumudo, 430 Mich 326; 422 NW2d 688 (1988).....29

Clark v Dalman, 379 Mich 251, 261; 150 NW2d (1967).....10

Cotton v Kambly, 101 Mich App 537 (1980).....32, 33

Davis v Lhim, 124 Mich App 291; 335 NW2d 481 (1983).....29

Dawe v Dr. Reuven Bar-Levav & Assocs. P.C., 485 Mich 20, 26; 780 NW2d 272 (2010) .. passim

Estate of Clark, 33 Mich App 395, 401 (1971) 23

Francisco v Manson, Jackson & Kane, Inc., 145 Mich. App. 255 (1985) 23

Ginther v Zimmerman, 195 Mich App 647 (1992) 23

Hill v Sears, Roebuck & Co., 492 Mich 651, 660; 822 NW2d 190 (2012) 8

Hungerford v Jones, 143 N.H. 208; 722 A 2d 478, 480 (N.H. 1998)..... passim

In re Certified Question for the Fourteenth Dist Court of Appeals of Texas, 479 Mich 498, 505-506 (2007)..... 8

Law Offices of Lawrence J. Stockler, PC v Rose, 174 Mich App 14 (1989)..... 22

Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999)……5

Malik v William Beaumont Hosp. 168 Mich App 159; 581 NW2d 739 (1998).....10, 30

Michigan Citizens for Water Conservation v Nestle Waters North America Inc., 269 Mich App 25; 709 NW2d 174 (2006).....5

Mieras v DeBona, 452 Mich 278 (1996) 23

Miller v Kretchmer, 374 Mich 459 (1965)…….…….....33

Montoya v Bebensee, 761 P2d 285, 288 (Colo. App. 1988)..... 10, 11, 14, 15

Nicholson v Han, 12 Mich App 35; 162 NW2d 313 (1968)…….…….33

Oakland County Prosecutor's Office v Dept of Corrections, 222 Mich App 654 (1997).....26

People v Stanaway, 446 Mich 643 (1994).....20

Roberts v Salmi, 308 Mich App 605, 629 (2014); 866 NW2d 460.....passim

Richards v Weersing, unpublished per curiam opinion of the Court of Appeals, issued February 15, 1995 (Docket No 146282).....32

Ryder v Mitchell, 54 P3d 885 (Colo. 2002) 15

S. v Child & Adolescent Treatment, 161 Misc. 2d 563; 614 NYS2d 661, 666..... 16

Sawyer v Midelfort, 227 Wis 2d 124, 142; 595 NW2d 423 (Wis. 1999)..... passim

Swan v Wedgwood Christian Youth & Family Services, Inc., 230 Mich App 190; 583 NW2d 719 (1998).....28

Tarasoff v Regents of the Univ of California, 17 Cal 3d 425; 551 P2d 334 (1976) 10, 29

Teadt v St. John's Evangelical Church, 237 Mich App 567 (1999).....32

Williams v Cunningham Drug Stores, 429 Mich 495, 499; 418 NW2d 381 (1988).....9

Williams v Polgar, 391 Mich 6 (1974) 22

Young v Oakland General, 175 Mich App 132 (1989).....31

Statutes

MCL § 330.1750.....27

MCL § 330.1946.....7, 28, 29

MCL § 333.18117.....24

MCL § 333.26261.....24

MCL § 333.26263(d).....25

MCL § 333.26263(e).....25

MCL § 600.2901.....31, 34

MCL § 600.2912a 11

MCL § 722.633(2).....2, 10

Federal Regulations

45 CFR § 164.501.....26

45 CFR § 164.512(e).....25

45 CFR § 164.512(e)(1)(i).....25

45 CFR § 164.512(e)(1)(ii).....25

45 CFR § 164.524(a)(1)(i).....25

Other Authorities

Restatement Torts, 2d, § 552 ..... 22, 23

STATEMENT OF QUESTION PRESENTED

Whether a mental health professional has a duty of care to third parties who foreseeably might be harmed by the mental health professional's use of techniques that cause a patient to have false memories of sexual abuse.

PLAINTIFF/APPELLANT SAYS YES

DEFENDANT/APPELLEE SAYS NO

THE TRIAL COURT SAYS NO

THE COURT OF APPEALS SAYS YES

COUNTER-STATEMENT OF FACTS

This is an action seeking to hold a licenses professional counselor liable for damages to a third party. It appears to be an issue of first impression in this state. Defendant-Appellant Kathryn Salmi, LPC d/b/a Salmi Christian Counseling has appealed by leave granted by order of this Court dated September 16, 2015 (Apx 365a) from the published opinion of the Court of Appeals dated December 18, 2014 (Apx 14a). The Court of Appeals reversed and remanded the lower court ruling by upholding a limited right to a third party parent to assert a cause of action against a negligent therapist for utilizing "inappropriate treatment techniques or inappropriately applies otherwise proper techniques which cause the parent's child-patient to have a false memory of sexual abuse by a parent." *Roberts v Salmi*, 308 Mich App 605, 629 (2014); 866 NW2d 460. (Apx 14a).

Plaintiffs submit that the Circuit Court's grant of Summary Disposition under MCR 2.116(c)(8) was improper in that it failed to consider the body of common law within the State of Michigan as eloquently recited in the majority opinion of the Court of Appeals relevant to determining whether the Defendant owed a duty, a very limited one at that, to avoid foreseeable harm to a very small class of very foreseeable Plaintiffs. Defendant, in her Statement of Facts, also attempts to submit arguments to this Court that are outside of the scope of the Court's Order Granting Leave, and therefore are improper. Furthermore, these arguments were not persuasive to either the Circuit Court or the Court of Appeals, and were not the subject of any appeal in the Court of Appeals and thus are deemed waived.

Underlying Facts

As this case was dismissed under MCR 2.116(C)(8) (Defendant alleged that Plaintiffs failed to state a claim upon which relief can be granted) the factual record is somewhat sparse. Plaintiffs sent their then minor daughter, "K," to attend counseling sessions with the Defendant in early July 2009 for the purpose of addressing the mental and psychological issues stemming from an assault, that was sexual in nature, at the hands of a man named George Coppler. (Apx 33a. ¶¶ 10-11). During these sessions, Salmi engaged in the controversial and disapproved of method of "Recovered Memory Therapy" which resulted in "K" claiming that she had memories of childhood sexual abuse at the hands of both of her parents. (*Id*., ¶¶ 12-16, 19, Apx 34a). Plaintiffs were invited to attend a joint counseling session with "K" at the request of the Defendant. (*Id*. at ¶¶ 14-16, Apx 34). Lale Roberts was asked to enter the room first alone, where Defendant confronted him with the allegations that he had molested and abused his daughter, all while "K" sat silent in a chair shaking and curled up in a fetal position. (Apx 161a). Joan Roberts was then asked to join the session, and saw the carnage of what Defendant had done upon walking into the room. (*Id*.) Defendant reiterated the allegations to Mrs. Roberts, briefly discussed their payment arrangements for the session, handed her a bill, and asked both Plaintiffs to leave. (*Id*.)

Two months later[1], Salmi reported the allegations of sexual abuse to Child Protective Services on September 15, 2009, which along with the Michigan State Police investigated both Plaintiffs. (Apx 34a, ¶¶ 17-18). Charges were eventually declined by the Baraga County Prosecuting Attorney. (*Id*. at ¶ 20).

[1] A misdemeanor under MCL 722.633(2).

Soon after, "K" severed all ties with Plaintiffs and made further, and more lurid complaints to police and in the community against Plaintiffs. (*Id*., ¶ 21).

Plaintiffs filed their complaint on January 9, 2012 alleging malpractice against Defendant. (Apx 32a). Little discovery occurred in the case, with the exception of Defendant's interrogatories and requests for documents, and a blocked deposition. (Apx 65a).

Motion for Summary Disposition and the Trial Court Decision

Defendant filed a motion for summary disposition under MCR 2.116(C)(8), alleging that Plaintiffs have failed to state a claim upon which relief can be granted. The lower court heard arguments on January 10, 2013 and granted Defendant's motion, reasoning that it does not "find under Michigan law the duty of this therapist of – to exercise care as a matter of law owed by the therapist to the plaintiff, the parents of the child in this case." (Apx 286a at 323a). It went on to hold that the issue of whether this cause of action should be allowed is one for the legislature or appellate courts. (*Id*. at 321a-323a). The lower court did, however, reject all of the Defendant's alternative theoriesAn order was entered reflecting the lower court's decision on January 18, 2013. (Apx 10a.)

Plaintiffs filed their timely Motion for Reconsideration on Februray 7, 2013.(Apx 328a) The lower court requested additional briefing, and ultimately issued its opinion on April 17, 2013 denying Plaintiffs; motion. (Apx 12a) .

Court of Appeals' Decision

Plaintiffs then filed a timely Claim of Appeal with the Court of Appeals. (Apx 354a). The case was briefed again, and oral argument was heard on a calendar call. The end result was a published decision in which Judges William B. Murphy and Michael J. Kelly, joined a majority

opinion that reversed and remanded the trial court's granting of summary disposition, and instead found a limited duty that was tailored to the facts of this case. (Apx 14a). Judge David H. Sawyer wrote a separate dissenting opinion in which he expressed concern that the court was acting as a competing branch of the legislature by recognizing this cause of action as coming from the common law. *Roberts* at 634-636.

This Court granted leave on September 16, 2015 to consider the sole issue of:

> …whether a mental health professional has a duty of care to third parties who might foreseeably be harmed by the mental health professional's use of techniques that cause a patient to have false memories of sexual abuse. (Apx 365a)

Plaintiffs submit this brief and argue that the decision of the Court of Appeals was firmly based in the common law and jurisprudence of this state. Plaintiffs respectfully request this Honorable Court affirm the Court of Appeals' majority decision in full, and remand this case to the trial court for further proceedings.

STANDARD OF REVIEW

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id*. A motion under MCR 2.116(C)(8) is considered only on the pleadings and may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. at 119-120.

A trial court's ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(8) is reviewed de novo. *Id.* at 118.

Appellate courts also review de novo, as a question of law, the proper scope and application of the common law. *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc, aff on other grounds,* 269 Mich App 25, 53: 709 NW2d 174 (2006).

ARGUMENT

A. A MENTAL HEALTH PROFESSIONAL DOES HAVE A DUTY OF CARE TO THIRD PARTIES WHO FORESEEABLY MIGHT BE HARMED BY THE MENTAL HEALTH PROFESSIONAL'S USE OF TECHNIQUES THAT CAUSE A PATIENT TO HAVE FALSE MEMORIES OF SEXUAL ABUSE

In its ruling, the Court of Appeals did not create a new cause of action. Rather, it looked at the deep tradition of common law within this State and saw that in many cases, where the legislature remains silent, the courts have found causes of action and third party standing to sue, especially in those situations where the third party is foreseeably harmed. The Court of Appeals then carved a very narrow, limited factual scenario in which a mental health professional could owe a duty to a third party. Cases from courts in several states are split on this precise issue reflecting a vast differing of opinion, as well as a vast differing of the various states' common law. As the Court is well aware, this case originated in the western Upper Peninsula, in a place approximately 50 -75 miles from our neighbor to the west, Wisconsin. The supreme court of Wisconsin addressed both concerns cited by Defendant in her brief. While it is true that the Court of Appeals in its majority opinion has recognized the cause of action asserted by the Plaintiffs in this case, they did nothing to change the relationship and behavior of therapists in treating people who are, or might be, sexual abuse victims. Rather, the Court of Appeals merely restated current standard care by holding that "the mental health professional would have the full array of therapeutic techniques at his or her disposal, subject only to the duty to treat his or her patient in a way that minimizes the risk that the patient will develop false memories of childhood sexual abuse. This standard is the same standard that already applies to mental health professionals: they must treat their patients with competent and carefully considered professional judgment.." *Roberts* at 625-26, quoting *Hungerford v Jones*, 143 N.H.208, 212; 722 A. 2d 478,

480 (N.H. 1998). Furthermore, the Court of Appeals goes on to state that there are policy considerations that would call for allowing recognition of a duty in this limited instance because by failing to do so could encourage the continued use of questionable therapeutic techniques on uninformed patients. *Id*. at 626.

There is no burden on a therapist in the recognition of this duty, as the therapist is the person in the best position to prevent the harm cause by the introduction of false memories, and is solely responsible for the treatment procedures, techniques and modalities. There is no extension of the statutory duty to warn or protect a third party under MCL § 330.1946, but rather a recognition of the rights of those select few individuals who send their children to therapy only to be falsely labeled as molesters and rapists because of the misfeasance of a therapist.

1. Under Michigan common-law, and public policy, Defendant owed a legal duty to Plaintiffs in her negligent treatment of their daughter

As stated previously, the trial court granted summary disposition on Plaintiffs' Complaint under MCR 2.116(C)(8), finding Plaintiffs' failed to state a claim upon which relief could be granting. In fashioning its holding, the trial court specifically found that there was no legal duty owed by Defendant, a counselor, to Plaintiffs', the parents of the minor child treating with Defendant.

The issue of duty is tantamount to every cause of action that lies in tort, and specifically, negligence. "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). In Michigan, the Courts have found that "[g]enerally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of common law." *Hill v Sears, Roebuck & Co.*, 492 Mich 651, 660; 822 NW2d 190 (2012).

Plaintiffs contend that all three of the above situations are present in this matter, and were plead in their Complaint.

In this brief, Plaintiffs will address whether there was a duty under common law first. In order to determine if a legal duty exists at common law, the Court must consider

> whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person. The ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty.

Hill at 661. The court must consider several relevant factors including:

1. The relationship of the parties;
2. The foreseeability of the harm;
3. The burden on the defendant, and
4. The nature of the risk presented

In re Certified Question for the Fourteenth Dist Court of Appeals of Texas, 479 Mich 498, 505-506 (2007). The court places considerable emphasis on the first two factors.

The first factor is the relationship of the parties. As stated in the Complaint, and herein, Plaintiffs sought out Defendant for the treatment of their daughter for depression, as well as mental health issues related to being sexually assaulted by George Coppler. Further, they sought out Defendant to treat them as a family in certain group sessions. At this time, K was the Plaintiffs' minor child, for whom they had to give consent to treat. Because she was a minor, the Plaintiffs were essentially in the position of the patient. They had to choose to treat with Defendant, along with all of the attendant considerations that come with making a decision to treat with any healthcare provider. They investigated her background. They met with her to get

a feeling for her, her practice, and her particular style of treatment. They had to put their trust in Defendant in hopes that she would do her job, not harm her child, and certainly not implant false memories of abuse that never happened.

Moreover, they entered into a quasi-contractual relationship wherein they agreed to pay Defendant's fees in exchange for Defendant's proper treatment of their daughter. However this Court should not treat this as it would a contract to purchase goods, but rather as a contract that expressly involves a high degree of trust and confidence. Plaintiffs sent their daughter to counseling sessions with Defendant because of issues she was having after being molested by another man. On her literature, Defendant states that she offers counseling in incest and rape cases. There clearly was a special relationship between Plaintiffs and the Defendant.

Where there is a special relationship, Michigan courts have found that there can be a duty where none was previously found, nor was existent by operation of statute or contractual obligation. *Williams v Cunningham Drug Stores*, 429 Mich 495, 499; 418 NW2d 381 (1988). The duty is derived from and by the special relationship and whom has the control therein. *Id*. "[O]ne person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.´ *Id*.

The relationship between a patient and therapist has been granted the status of a special relationship. *Dawe v Dr. Reuven Bar-Levav & Assocs. P.C.*, 485 Mich 20, 26; 780 NW2d 272 (2010). The *Dawe* court also held that in this same context, there is a common law duty that "not only requires a psychiatrist to protect his or her paitents but also to warn third persons or protect them from harm by a patient under certain circumstances **regardless of the psychiatrists**

relationship with that third person." *Id*. (Emphasis added) This line of reasoning was derived from the seminal case of *Tarasoff v Regents of the Univ of California*, 17 Cal 3d 425; 551 P2d 334 (1976).

However, Plaintiffs' cause of action and claim of negligence here is not based upon the actions of a third party being treated by Defendant, as in *Dawe* and *Tarasoff*. The questions is, rather, whether a mental health provider owes a duty to refrain from taking actions of her own that may foreseeably result in injury to another.

In a medical malpractice action, a health professional's duty to perform within the standard of care normally extends only to the health professional's patient, and the Courts in this state have held that a plaintiff cannot sue in malpractice for damages that are derivative to harm caused by negligent treatment by a health professional of a loved one. *Malik v William Beaumont Hosp*. 168 Mich App 159, 168-170; 581 NW2d 739 (1998). Defendant argues that the analysis on this case should end here. However, our courts have long recognized that a professional may be liable in malpractice to a third-party for harms cause by his or her breach of the applicable standard of care notwithstanding the lack of a professional-client relationship with the third-party.

However, Michigan's common law imposes a general duty of care on every person to refrain from taking actions that unreasonably endanger others or their property. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d (1967).

This was the exact question presented to the Colorado intermediate appellate court in the case of *Montoya v Bebensee*, 761 P2d 285, 288 (Colo. App. 1988)). In resolving the issue, the *Montoya* Court considered "both the great social utility of having therapists make reports of

suspected child abuse and the significant risk of substantial injury that may occur to one who is falsely accused of being a child abuser." *Id.*. The court concluded that "a mental health care provider owes a duty to any person, who is the subject of any public report or other adverse recommendation by that provider, to use due care in formulating any opinion upon which such a report or recommendation is based." *Id.* at 289. As discussed below, this standard is no greater than that which must be shown under MCL § 600.2912a to support and succeed in any malpractice action.

Plaintiffs argue that not only did they have a special relationship with Defendant because they were patients themselves, but also because they chose Defendant and trusted her to treat their minor child; not to implant, encourage and induce false memories in her.

The next factor is the foreseeability of the harm. Whether harm caused by a tortfeasor's negligence is foreseeable is a question of law for a court to consider. During oral argument at the hearing on Defendant's dispositive motion, and when reading his ruling, both Defendant's counsel and the trial court seemed to agree that foreseeability was not contested in this matter. When presented with the question of whether a therapist in a similar action in Wisconsin could be held liable by the falsely accused parents of a patient, the Wisconsin Supreme Court addressed six factors to determine whether public policy should preclude holding the defendant therapist liable. *Sawyer v Midelfort*, 227 Wis 2d 124, 142; 595 NW2d 423 (Wis. 1999). In addressing the second factor, whether the injury is too wholly out of proportion to the culpability of the negligent tort-feasor, the *Sawyer* court reasserted that state's jurisprudence tying culpability in negligence jurisprudence to foreseeability. *Id.* at 143. The defendants in that case conceded that "damage to a person accused of abusive behavior is certainly foreseeable," a

contention that the court wholeheartedly agreed with. Even jurisdictions that do not allow this type of a cause of action, and thus cited by Defendant, "acknowledge that the harm to a parent accused of sexual abuse if foreseeable." *Bird v W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994). Because, for the purposes of this appeal, and the relief granted to Defendant under MCR 2.116(C)(8), all allegations in the Complaint are held to be true, we must assume that Defendant implanted false memories of sexual and physical abuse in the mind of K. As noted by both the Wisconsin Supreme Court in *Sawyer* at 144, as well as the New Hampshire Supreme Court in *Hungerford v Jones*, 143 N.H. 208; 722 A 2d 478, 480 (N.H. 1998), "it is indisputable that 'being labeled a child abuser (is) one of the most loathsome labels in society' and most often results in grave physical, emotional, professional, and personal ramifications." The *Sawyer* Court hit the nail on the head when it stated "[w]e are quite confident that negligent treatment which encourages false accusations of sexual abuse is highly culpable[2] for the resulting injury.

The next factor to consider is the burden in placing liability on the Defendant. Defendant argued that this Court must go beyond looking at her individually, and to consider the burden that would be placed on all mental health professionals treating patients who claim to have been sexually abused as well as to consider the burden that this cause of action would place on the patient-therapist relationship.

In the jurisdictions that have allowed such a cause of action, each court has also weighed the utility of the rights of the falsely accused versus the burden on the therapist, and the relationship between therapist and patient. All of them recognize the difficulties that such a

[2] And thus foreseeable.

cause of action as this would place on the relationship. However, these jurisdictions have reached a contrary result to the cases cited by Defendant.

In *Hungerford*, the New Hampshire Supreme Court addressed a common concern adopted by those courts that refused to recognize a duty, that being "that to do so 'would carry with it the impermissible risk of discouraging [therapists] . . . from performing sexual abuse evaluations of children altogether, out of a fear of liability to the very persons whose conduct they may implicate.'" *Id*. at 214 (internal citations omitted). However, the court went on to reason that this holding "overlooks the fact that the standard of care by which a therapist's conduct is measured is not heightened. Our holding today imposes 'no more than what a therapist is already bound to provide – a competent and carefully considered professional judgment.'" *Id*. (citing *Althaus v Cohen*, 710 A2d 1147, 1157 (Pa. Super. Ct. 1998)).

As in Michigan, Defendant's conduct, choices of therapy practices and procedures will be subject to the same balancing test. An Amended Affidavit of Merit has been filed with the Court that proffers expert testimony that Defendant did deviate from the applicable standard of care. Plaintiffs have shown that they have met these criteria.

The *Sawyer* court also addressed this consideration, compiled with the broader policy decision of limiting liability based on a concern that scores of potential plaintiffs are out there in the ether. *Sawyer* at 144. The *Sawyer* defendants also argued that an allowance of recovery would place an unreasonable burden on the negligent tortfeasors because they claim, like the Defendant herein, that the plaintiffs were actually claiming for loss of their child's society and companionship. *Id*. at 144-145. The *Sawyer* court was wise to see through that misclassification of the plaintiffs' claim. It stated, "the Sawyers are not claiming loss of society and companionship or damages that resulted from their estrangement from their daughter. The

Sawyer's claim is related to the harm that arose directly as a result of [their daughter's] accusations." *Id.*

Also, in resolving this concern, courts in other jurisdictions have limited the scope of the cause of action to cases only involving those where the plaintiff(s) is/are wrongfully accused of sexually abusing the accuser. The *Sawyer* court provided such a limitation. *Id*. at 145. The Colorado Appellate Courts have also weighed in on this type of limitation. As stated above, in *Montoya v Bebensee*, 761 P2d 285 (Colo. App. 1988), the Court of Appeals of Colorado, Division One was faced with determining "whether a mental health provider owes a duty to refrain from taking actions of her own that may foreseeably result in injury to another." *Id.* at 288 . In that case, the mother of plaintiff's children made a report to the Department of Social Services (DSS) alleging that plaintiff had sexually abused his 4 year old daughter during a visit, during the pendency of their divorce. *Id.* at 286. The DSS worker investigated, and ultimately concluded that the abuse did not happen and closed the case. *Id*. at 287. The mother insisted that it happened, and that visitation should stop, and engaged the defendant to render an opinion as to whether the father sexually abused the child, and for therapy. *Id.* Defendant filed a report with DSS and testified at a hearing to terminate or modify the plaintiff's visitation. *Id.* It was discovered at the hearing that the defendant engaged in speculation, as well as controversial or improper methods to arrive at her conclusions. *Id*. In the civil suit that followed, the appellate court concluded that the therapist owed a duty of care to the non-patient father. *Id*. at 288. In reaching its conclusion, the Court considered "both the great social utility of having therapists make reports of suspected child abuse and the significant risk of substantial injury that may occur to one who is falsely accused of being a child abuser." *Id.* The court went on to state that "the burden of due care placed upon therapists is no greater than the duty that substantially all

professionals are required to meet." *Id.* The court summarized its holding by stating "a mental health care provider owes a duty to any person, who is the subject of any public report or other adverse recommendation by that provider, to use due care in formulating any opinion upon which such a report or recommendation is based." *Id.* at 289.

While *Montoya* was decided at the intermediate appellate level, the Colorado Supreme Court had a chance to overrule it in the case of *Ryder v Mitchell*, 54 P3d 885 (Colo. 2002). In *Ryder*, the therapist made a misdiagnosis of parental alienation on the part of the childrens' mother, with no allegations of any physical or sexual abuse. *Id*. at 886. In this instance, the Colorado Supreme Court distinguished the finding in *Montoya* from the facts present and found that in the facts present in this case, there was no duty owed. *Id*. at 892. The court reasoned "the risks to the parent of a misdiagnosis of parental alienation do not rise to the level of criminal repercussions or even termination of parental rights, such as those associate with an accusation of sexual abuse. A false allegation against a parent of child sexual abuse can cause substantial injury. . . Accordingly, we distinguish cases in which a therapist makes allegations of sexual abuse by a parent from cases in which the therapist misdiagnoses improper parenting skills or even parental alienation." *Id.*

What can be drawn from the analyses above are several conclusions:

1. False allegations against a parent of sexually abusing their child causes substantial, foreseeable injuries;
2. Therapists owe a duty of care to those accused, but that duty of care is no higher or more burdensome than that to which they ordinarily owe to their patient; i.e. to exercise the degree of a care that is normally called upon;

3. The cause of harm to a parent that is falsely accused of sexually abusing their child due to negligent therapy greatly outweighs the burden on therapists that is to "provide competent and carefully considered professional judgment." *Hungerford* at 214.

The final factor this Honorable Court must analyze is the nature of the risk presented. It should be clear of the grave nature of the risk herein. As stated *infra*, even jurisdictions that choose to not extend liability under these circumstances all agree that the harm, and the risks associated with engaging in negligent therapy, such as Defendant is alleged to have committed, are serious. As stated by the New Hampshire Supreme Court in *Hungerford*, "it is indisputable that 'being labeled a child abuser (is) one of the most loathsome labels in society' and most often results in grave physical, emotional, professional, and personal ramifications.'" *Id*. at 212.

Based on the above analysis of the factors, it should be clear that Defendant owed a legally recognized duty to Plaintiffs. That duty extends no further than the duty she owed K, or any other of her patients, and therefore placed no additional burden on her or her practice. Clearly, implanting false memories of sexual abuse in the mind of a vulnerable patient has real, grave, and foreseeable risks that the subject of said false memories would be impacted greatly and very negatively. "An accused parent should have the right to reasonably expect that a determination of sexual abuse, 'touching him or her as profoundly as it will, will be carefully made.'" *Sawyer* at 150 (citing *Hungerford* at 482, *S. v Child & Adolescent Treatment*, 161 Misc. 2d 563; 614 NYS2d 661, 666.

In regards to Defendant's public policy concerns, the Court need look no further than very recent history in this nation. This type of "therapy" has led to needless convictions of innocent people, destroyed reputations, broken families, and millions of dollars in fraudulently obtained

insurance benefits. A simple Google search for the name "Dr. Bennett Braun" would lead the members of this Court down the deep, dark rabbit hole that is recovered memory therapy and the just awful things it does to a family.

As stated in the Court of Appeals decision, in the *Rutherford* case, and as recognized by the Defendant, there is probably no more loathsome label than that of a child rapist, unless that label is a rapists of one's own children. But if you think about it, it's the perfect crime for a therapist to commit.

Step One: Use controversial (at best) tactics to implant false memories of childhood sexual abuse at the hands of the patient's parents;

Step Two: Fully develop and encourage these fantasy rapes while convincing the patient to sever all ties with family

Step Three: Collect thousands of dollars in insurance money treating a condition that you created

Step Four: If anyone challenges the therapy or accuses you of doing exactly what you have done, hide behind confidentiality and privilege.

Defendant's arguments about protecting "K" are irrelevant and moot. Removing the emotional appeal, it is clear that "K" is not the fragile waif as portrayed by the Defense. "K" has been interviewed by DHS workers and several MSP Troopers soon after Defendant made the

initial report to CPS in October, 2009[3]. She indicated that she wanted to press charges against her father at that time. She was ready, at that time, to go to bat for the prosecutor and testify, at minimum, two times regarding her allegations against her father.

It doesn't stop there. "K" has told her siblings about the alleged abuse, she has told several members of the congregation of her church, a bible camp, and the elderly adults whom she now lives with. She indicated on a petition to change her name that she had issues with her family. Lastly, and most importantly, "K" was deposed in a separate action on August 28, 2013. In that deposition, many of the same questions that would be relevant in this matter was put to "K" and she answered them without decompensating.

Also, one must not look too far to see that there should be a public policy exemption to the therapist-patient privilege in such a context as this. The Wisconsin Supreme Court was tasked with making this determination in 2005 in the case of *Johnson v Rogers Memorial Hospital, Inc.*, 283 Wis. 2d 384; 700 NW2d 27 (Wis 2005). (Exhibit 13). In that case, the Wisconsin Supreme Court was faced with answering a Certified Question from their intermediate appellate court. In that case, as here, the lower courts were faced with an adult child who had accused her parents of physical and sexual abuse based on memories recovered during therapy. *Id.* at 389-90. The parents sued the therapist under a *Sawyer* cause of action[4]. But unlike in *Sawyer* where the plaintiffs' daughter had died prior to the suit being filed, Johnson's daughter was very much alive, and very unwilling to waive her privilege because she still believed the lies that her

[3] Yet another reason Defendant seeks to have all of this information quashed. She failed to report the suspected child abuse way back in July when Defendant first confronted Plaintiffs with the allegations that "K" supposedly told her. This is a misdemeanor offense. MCL § 722.633(2).

[4] *Sawyer v Middlefort, supra*.

therapist implanted in her head. *Id*.

Johnson had previously been before the Wisconsin Supreme Court. In *Johnson I*, the Wisconsin Supreme Court was faced with this exact public policy issue. The court of appeals held that because the daughter "never waived her right to . . . confidentiality, nor relinquished [the] privilege . . . the Johnsons could not prove their claim, nor could the therapists defend against it, without imposing significant collateral burdens on the therapist patient confidential relationship." *Johnson v Rogers Memorial Hosp. Inc.*, 238 Wis 2d 227; 616 NW2d 903 (Wis 2000). (Exhibit 14). The Wisconsin Supreme Court reversed and remanded the case holding that the "resort to public policy was premature because the record did not clearly indicate whether a burden would be placed on the therapist-patient confidentiality." *Johnson II* at 393-94. The case was remanded to see if the daughter had waived her privilege, or whether the privilege applied at all. *Id*.

When the case made its way back to the Wisconsin Supreme Court in *Johnson II*, the lower court did develop its record, however the plaintiffs were still in the same predicament. This time the court found that the privilege must give way to the public policy aim of preventing negligent therapy.

It is true that the purpose of the privilege is to encourage frank discussion with a therapist in order to provide effective psychotherapy aimed at ending with successful treatment. But as the court in *Johnson II* recognized, "[w]hen the end is divorced from the means, however, such that 'negligent therapy' is left to flourish within the confines of the therapist-patient relationship, the privilege no longer serves its purpose. What was meant to be a device to help care for problems

becomes a shelter to protect careless and negligent practices. The privilege cannot be distorted in this manner." *Johnson II* at 414.

The court then summed up the premise in the next paragraph stating:

> While we recognize the benefit from allowing therapists to diagnose and treat victims of sexual and physical abuse as children, no utility can be derived from protecting careless or inappropriate therapists and their practices. The costs are simply too severe: the therapist is allowed to continue negligently "treating" others, the patient remains disillusioned by the falsehoods, and the accused suffers the torment of being branded a child-abuser. We do not hesitate to conclude that mechanical application of the therapist-patient privilege to allow such results to continue unimpeded ill serves the public.

Id. The court recognized that there cannot be a wholesale waiver of the privilege in every circumstance where a parent accuses their child's therapist of engaging in negligent therapy. First, the court held that the records would not be immediately turned over to a Plaintiff, but rather would be given to the court for an *in camera* review. In determining when a party could even request such a review, the court fashioned a limited remedy and found the basis for it in their criminal law. In *Wisconsin v Green*, 253 Wis 2d 356; 646 NW2d 298 (Wis 2002), the Wisconsin Supreme Court refined and heightened the standard to be used when a criminal defendant sought an *in camera* review of a victim's therapy record. The court followed Michigan, and several other states' leads and adopted the same standard announced by This Honorable Court in *People v Stanaway*, 446 Mich 643 (1994).

The *Johnson II* court applied the same (Stanaway) standard, but modified it to apply to a civil proceeding. *Johnson II* at 419. First, a plaintiff must "commence a reasonable investigation into the type of therapy the plaintiff's child underwent before moving for an in camera review. This includes exploring whether the child has already waived the privilege or is otherwise willing to disclose the records." *Id*. at 419-20. Secondly, after

attempting a reasonable investigation, a "plaintiff must set forth a good faith fact-specific basis demonstrating a reasonable likelihood that the records contain information regarding negligent treatment." *Id.* The court then departed from the criminal standard by holding that if the plaintiff is successful in establishing an reasonable likelihood that the records contain information regarding negligent treatment, "the circuit court must proceed to conduct an in camera review regardless of the victim's lack of consent." *Id.* The court deviated from the criminal standard because common sense dictated it do so. The allegations in *Johnson*, as in this case, are that the daughters are unsuspecting victims of falsely implanted and reinforced memories causing the daughters to want nothing to do with their parents. *Id*. at 420. It would make little sense to require the daughter's consent because it would not be forthcoming due to the negligent therapy. The court concluded by stating "that the victim[5] cannot impede the claim." *Id.*

In practice, the *Johnson* plaintiff retained an expert in false memory syndrome who reviewed what records they had, reviewed statements made by the parties, viewed family photos, videos, etc. and review the daughter's descent only after the therapy began. The expert then drafted and filed an affidavit in support of the plaintiff's motion and the lower court agreed that the burden had been met and ordered an in camera review of the daughter's records.

[5] That is the victim of the negligent therapy.

Even though Plaintiffs in this matter believe that it is this issue is not ripe before this Court, the *Johnson* case provides a roadmap for the Court to consider if it chooses to take this issue up.

2. <u>Other instances of Third-Party Liability in Professional Malpractice Cases in Michigan</u>

While the particular, specific facts of this case may be an issue of first impression before this Court, and the Appellate Courts of this state, the underlying law and concepts are not new. Michigan courts have recognized the legitimacy of third-party professional negligence claims in other circumstances. As discussed below, Plaintiffs state that recognizing their cause of action is not creating new law, but rather, merely the application of a new set of facts to established law.

First, this Court adopted a broad standard of duty in the case of *Williams v Polgar*, 391 Mich 6 (1974), which stood for the proposition that a title abstractor, who certified the condition of the record of title for a particular piece of property, must perform his abstracting duties in a diligent and reasonably skillful, workmanlike manner, and this duty extended to all those persons that an abstractor could reasonably foresee relying on the accuracy of the abstract. *Id*. at 22.

In the case of *Law Offices of Lawrence J. Stockler, PC v Rose*, 174 Mich App 14 (1989), the Court of Appeals adopted the reasoning contained in the Restatement Torts, 2d, § 552. This section states:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is

> limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Restatement Torts, 2d, § 552. In applying and adopting this section of the Restatement, the Court found that an accountant can be liable to a third party for negligence. *Id*. at 37.

Likewise, architects are held to owe a duty not only to their client, but to anyone lawfully on the premises, with no requirement for privity of contract. See *Francisco v Manson, Jackson & Kane, Inc.*, 145 Mich. App. 255 (1985), and *Estate of Clark*, 33 Mich App 395, 401 (1971).

Even attorneys are not above liability to third parties based upon malpractice. Many Michigan cases have held an attorney responsible to intended beneficiaries of a negligently drafted will or trust. *Mieras v DeBona*, 452 Mich 278 (1996); *Ginther v Zimmerman*, 195 Mich App 647 (1992), to name a few.

The common theme requiring application of third-party liability throughout all of the above causes of action is that each profession requires its own standard of requisite care, a violation of which causes easily foreseeable harm to third parties, other than the direct client. The same is true of Defendant in this case.

B. WHETHER THE RECORDS ARE CONSIDERED CONFIDENTIAL HAS NOT BEEN DECIDED BY THE LOWER COURTS, AND THEREFORE IS NOT RIPE

FOR APPELLATE REVIEW AND FURTHERMORE IS NOT A BAR TO PROCEEDING ON PLAINTIFFS-APPELLEES' CLAIMS

For the first time, in her application, Defendant has advanced this new theory that because of HIPPA, the Michigan Medical Records Access Act, MCL§ 333.26261, et. seq., and the privilege set forth in MCL § 333.18117, no duty of care should extend to nonpatient third parties. She claims that because of the duties imposed by these statutes, Defendant can not properly defend herself in the present action because the communications are privileged and not subject to disclosure here.

This is prime example of a therapist attempting to use evidentiary protections and privileges for an improper purpose. These statutes are designed to be a shield, to prevent disclosure of confidential communications in order to further and foster that patient/therapist relationship. The Defendant is attempting to use that same privilege not only as a shield to hide her misfeasance, but as a sword, using it to strike down this cause of action and to forever hide her wrong doing.

The other problem with this line of argument is that in reading the Complaint, it is clear that these exclusionary statutes are inapplicable. The Roberts' claim that they too were patients of Defendant Salmi and attended a GROUP COUNSELING session. As stated above, it was Salmi who confronted the Plaintiffs with the allegations, thus breaching all of the privileges she is now seeking to invoke.

1. **The Michigan Medical Records Access Act and HIPAA are not applicable to the records at issue in this case, and furthermore are not relevant to the determination of whether a duty exists**

Defendant first invokes the Medical Records Access Act. MCL § 333.26261 et. seq. In viewing the plain language of the statute, it is clear that it is not applicable to the case at bar. As

noted in her brief, Defendant correctly states that a professional counselor is specifically excluded from the definition of "Health care provider." MCL § 333.26263(e). This flows logically from the definition of "Health care" which is "any care, service, or procedure provided by a health care provider to diagnose, treat, or maintain a patient's physical condition. . ." MCL § 333.26263(d). Based on the plain language of the statute, and the definition cited by Defendant of "Medical record," Defendant Salmi does not possess "medical records." She is not a health care provider, nor does the provide any of the services defined as "health care." Any reference to this act should be quickly dismissed as the Red Herring that it is.

Next, Defendant looks to the Health Insurance Portability and Accountability Act (HIPAA) as a means to serve her purpose of hiding her deeds. Again, her reliance on this section is misplaced, and in this instance, premature. Under the regulations governing HIPAA compliance, 45 CFR § 164.512(e), compliance with HIPAA could be accomplished as simply as waiting for the lower court to issue an order (§§(e)(1)(i)), complying with a subpoena (§§(e)(1)(ii)), or by stipulating to a qualified protective order. Admittedly, none of this has been done yet.

Also of note in the regulations cited by Defendant is her reliance on §§ 524(a)(1)(i) which states that an individual does not have access to psychotherapy notes. Under §§ 501, "Psychotherapy notes" are defined as notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record." However, the regulation goes on to state "*Psychotherapy notes* excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan,

symptoms, prognosis, and progress to date." 45 CFR § 164.501. Notably, many of those exclusions are the exact evidence that Plaintiffs seek to prove their case. So despite Defendant's contention that a denial is "unreviewable," Plaintiffs' could still be granted access to certain things.

2. <u>The Record Is Devoid of Any Reference as to Whether "K" will invoke the counselor-client privilege, and Furthermore The Privilege Could be waived in fact, or as a Public Policy Measure</u>

But again, this entire line of argument, along with Defendant's next argument regarding the counselor-client privilege ignores the fact that Plaintiffs were themselves patients of Defendant and had their own belief that they were hiring Ms. Salmi not only to treat their daughter, but to also provide group and/or family counseling.

The Defendant has put the proverbial cart before the horse in this regard. There is NO evidence on the record to suggest that the privilege is even applicable. First, the Plaintiffs have, for all intents and purposes relevant to this litigation, have waived the privilege that they possess with Defendant since they too were patients. Furthermore, their daughter waived the privilege by her actions. It was with her consent that the Plaintiffs were present at the joint counseling session in July 2009. It was in her presence that Defendant charged Plaintiffs with several of the allegations of improper conduct that "K" had relayed to her. "Once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears." *Oakland County Prosecutor's Office v Dept. of Corrections*, 222 Mich App 654, 657 (1997).

Defendant goes further in hiding behind alleged statutory to the point of asking for an absurd result. Specifically, Defendant relies on MCL § 330.1750 in support of this proposition. The statute stands for the proposition that Defendant can not even state that "K" was a client. Obviously the Plaintiffs know that their daughter treated with Defendant. They met with her prior to counseling starting. They chose her to treat their daughter. They spoke to her during the treatment of their daughter and received progress reports. They were invited to the group counseling session in July, 2009 by her. They were present when Defendant lodged all of the allegations against them during that session. They received the bill for "group counseling" from Defendant. They still spoke to Defendant Salmi for an appreciable period of time after the ambush session regarding the treatment of "K." So not only to Plaintiffs contend that there is no privilege, but that it is clearly been waived for all intents and purposes.

Just as an example of how other Courts have dealt with this issue, we can look again to the supreme court of our neighboring state Wisconsin for persuasive guidance in how to deal with this issue. In the *Johnson* case, the court was presented with the same factual scenario that Defendant alleges is present here. The difference between the two cases is that in *Johnson*, the case was remanded to the trial court to develop a factual record regarding whether the child-patient would waive the privilege and confidentiality, or whether it was to be deemed waived by the actions of the child-patient. *Johnson*, 700 NW2d at 32. By the time the case was in that state's supreme court on the second time around, the lower courts held that there was no waiver, and there was no way around the statutory prohibitions on using otherwise privileged or confidential materials. *Id*. at 34-35. The *Johnson* court went through great lengths to find that there was no express or implied waiver of privilege and confidentiality in the cause. *Id.* at 37-41. However, the court found that there should be, and was, a very limited public policy exception to

the general rule of prohibition. The court reasoned that in applying the mechanical approach to the privilege and confidentiality statutes in Wisconsin[6], it would allow therapist "to continue negligently 'treating' others, the patient remains disillusioned by falsehoods, and the accused suffers the torment of being branded a child-abuser." *Id.* at 42. As state above, the court adopted a methodology wherein a plaintiff in this type of cause of action could go about getting the records reviewed by the trial court *in camera* that is very similar to the method adopted by this Court in *Stanaway*, however modified slightly due to the "peculiarity of the cause of action at issue here." *Johnson* at 45.

As this Court can see, the answer to these questions posed by Defendant require an extensive fact finding mission to occur in the lower court. Because this has not occurred, and was even blocked by Defendant, it would be premature and improper for this court to make a ruling on these issues without a factual development on the record

C. A MENTAL HEALTH PROFESSIONAL'S COMMON LAW DUTIES WERE NOT ABROGATED BY THE ENACTMENT OF MCL § 330.1946, AND AS SUCH, A MENTAL HEALTH PROFESSIONAL DOES HAVE A COMMON LAW DUTY OF CARE TO THIRD PARTIES WHO FORESEEABLY MIGHT BE HARMED DUE TO NEGLIGENT THERAPY

In her brief, Defendant relies heavily on the holding in *Swan v Wedgwood Christian Youth & Family Services, Inc.*, 230 Mich App 190; 583 NW2d 719 (1998). One thing that should be of note to this Honorable Court is that this particular argument by Defendant was never addressed by either the trial court or the Court of Appeals. Her reliance on this case is misplaced, as *Swan* was essentially overruled, or at least the application of MCL § 330.1946 was clarified by this

[6] Which are very similar to those in Michigan.

Court (the court of higher jurisdiction) in the case of *Dawe v Dr. Reuven Bar-Levav & Assocs, PC*, 485 Mich 20; 780 NW2d 272 (2010).

Defendant does address *Dawe* in a footnote, but clearly only gives its holding and language a footnote's worth of consideration. Defendant claims that *Dawe* only applies to patients; not a third party. This Court held that MCL § 330.1946 only abrogated the common-law duty of a mental health profession in the context where 1) a patient makes a threat of violence; 2) the threat is against a reasonably identifiable third person; and, 3) the patient has the apparent intent and ability to carry out the threat. *Dawe* at 278. This Court held that "on its face, that statute only defines a mental health professional's duty to warn or protect a third person from a 'threat as described in MCL § 330.1946(1). Nothing in the statute indicates that the Legislature intended to completely abrogate a mental health professional's common law duties…" *Id*. at 278-279.

This is important because the holding in *Dawe* renders the holding in *Swan* inapplicable to the facts before this Court, as well as the underlying justification adopted by the Court of Appeals in overturning the trial court's grant of summary disposition. The Court of Appeals found the Defendant's duty to exist in the Common Law, irrespective of the statutory duty contained in MCL § 330.1946. This Court in *Dawe*, under the rules of statutory construction, correctly decided that the legislature did not intend to completely abrogate all common law duties of a mental healthcare provider in enacting the statue. Rather, the legislature intended to merely codify its version of the *Tarasoff* rule after this Court reversed *Davis v Lhim*, 124 Mich App 291; 335 NW2d 481 (1983) on other grounds sub nom in *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988).

D. DESPITE NOT BEING TIED TO THE QUESTION PRESENTED BY THIS COURT, NOR PART OF ANY CROSS-APPEAL IN THE COURT OF APPEALS, DEFENDANT'S ASSERTIONS THAT THIS IS MERELY A CLAIM FOR DERIVATIVE DAMAGES , OR FOR "ALIENATION OF AFFECTIONS" IS CLEARLY MISPLACED, AND HAS BEEN CORRECTLY DECIDED BY ALL COURTS UP TO THIS POINT

Defendant's argument that Plaintiffs do not have an independent claim for their own damages lacks any merit. Furthermore, the cases that they cite, and have cited to at every level in this case are highly distinguishable to the point that they aren't really relevant.

In *Malik v Wm Beaumont Hospital*, 168 Mich App 159 (1988), the Court of Appeals did reject the claims of the plaintiff for alleged malpractice stemming from a kidney transplant to the plaintiff's decedent sister. Plaintiff essentially argued, that due to the Defendant's subsequent negligent treatment of his sister, he unnecessarily lost a kidney. The court held that even if it held that he was owed a duty by the defendant, plaintiff consented to giving up his kidney prior to the commission of the complaint of malpractice, and therefore the was no proximate cause to his injury. *Id*. at 169. The court the reasoned that absent this claim, his remaining claims boil down to claims for loss of consortium, a claim the court was not willing to extend to siblings as opposed to the parent-child relationship. *Id.*

Plaintiffs' claims herein are very different. They are seeking redress for the improper treatment that their daughter received from Defendant, which directly and proximately resulted in their daughter accusing them of physical and sexual abuse. Furthermore, *Malik* is inapplicable because Plaintiffs certainly did not consent to the complained of treatment. Finally, *Malik* stands for the proposition that a loss of consortium claim is limited to a parent-child context. Plaintiffs are the parents of the patient herein.

Next Defendant places her reliance on *Young v Oakland General*, 175 Mich App 132 (1989). As cited by Defendant, she only relies upon the holding of the Court of Appeals dealing with Count II of the *Young* complaint which was for Intentional Infliction of Emotional Distress. However, the court did not address whether a duty was owed, per se. Rather, the court relied upon the evidence introduced in the case wherein plaintiff admitted in a deposition that he was unsure of whether the decedent was actually a Jehovah's Witness, or that she actually did object to a blood transfusion. *Id.* at 138-139. This case does not stand for the proposition stated in Defendant's brief, and is wholly inapplicable to the case at bar.

Their claims not only those for the emotional pain and suffering that they have faced, but also for the shock, mortification, and loss of standing in their community after being falsely accused incestual rapists. They aren't seeking loss of consortium for the loss of their daughter but rather are seeking compensation for their real and separate damages. It is the Defendant's misfeasance that led to a separate, distinct, and unique injury to these specific non-patient third parties. As stated below, they are seeking damages for the loss of their daughter, whether or not those should rightfully be awarded to them, they are seeking damages extending from Defendant's acts which subjected them to community scorn, ridicule, and for a moment, criminal penalties.

Defendant also holds onto the misguided notion that despite pleading a prima facie case of medical malpractice, this is really a dressed up version of the abolished tort of "alienation of affections" MCL § 600.2901. In support of their proposition, Defendant ignore all of the caselaw that has thus been presented to them via Plaintiffs' Response to their Motion for Summary Disposition.

As stated above, Plaintiffs are suing Defendant not for causing their daughter's alienation, but for the damages directly and proximately caused by Defendant's negligent treatment of the Plaintiffs' daughter that resulted, not only in the alienation of their daughter, but also in real and separate damages i.e. pain and suffering, depression, fear, ridicule, scorn, shame, embarrassment, etc.

The jurisprudence of this state has long held that simply because one's cause of action could lie in the tort of alienation of affections doesn't mean that their entire case is barred. Furthermore, our intermediary appellate court has had an opportunity to review this argument, and found that "[e]ven if the alleged malpractice involves conduct that could also support an alienation of affections claim, the malpractice claim is not precluded so long as plaintiff shows that the applicable standard of care has been breached." *Richards v Weersing*, unpublished opinion per curiam of the Court of Appeals, issued February, 15, 1995 (Docket No. 146282)(citing *Cotton v Kambly*, 101 Mich App 537, 541-542 (1980)) (See also *Teadt v St. John's Evangelical Church*, 237 Mich App 567 (1999), where a Plaintiff's complaint contained all of the elements of a case for seduction, the court looked to all of the allegations contained therein which took the cause of action beyond merely stating a claim of seduction).

In all of the above cases, the court looked to the allegations contained within the complaint. In each of them, the plaintiff properly plead all of the allegations that would be a prima facie case for the now-barred torts of seduction, or alienation of affections. However, in each case, the courts also found that despite the fact that some allegations constituted "dead" causes of action, taken as a whole, the plaintiffs were able to plead a separate and viable claim for something else. The same conclusion is drawn herein. Plaintiffs have plead a prima facie case of malpractice, plain and simple.

In support of her claim, Defendant relies upon the non-binding case of *Nicholson v Han*, 12 Mich App 35; 162 NW2d 313 (1968). Just doing a simple check for subsequent cases that cite *Nicholson* comes up with the case of *Cotton v Kambly*, 101 Mich App 537 (1980). In *Cotton*, the Court of Appeals reviewed the *Nicholson* case and distinguished it from the case at hand. The court noted that although the *Nicholson* plaintiff originally pleaded a count of malpractice in his complaint, only the trial court's ruling on the plaintiffs counts of breach of contract and fraud were heard by the Court of Appeals. The court in *Cotton* went on to find that even though "the facts alleged by plaintiff might also state a cause of action for common law seduction, we do not find that seduction was the gist of her malpractice claim." *Id*. at 541.

Miller v Kretchmer, 374 Mich 459 (1965) is another irrelevant case cited by the Defendant for her proposition that this is a case for alienation of affections. In that case, the question before this court was, "[s]hould Michigan adopt the view that minor children have a common law right of action for damages against a person who wrongfully induces one of their parents to desert them and leave the family home?" *Id*. at 460. Unlike any of the cases cited by Plaintiffs, the *Miller* plaintiff has no other causes of action other than what is stated above. This case is highly distinguishable and based on the jurisprudence of this state, offers no baring at all on this case.

Admittedly, it is very confusing that Defendant would next cite the case of *Berger v Weber*, 411 Mich 1 (1981) in support of her contentions. In the *Berger* case, the plaintiffs sued defendant for injuries that plaintiff mother suffered in a rear-end collision which was defendant's fault. *Id*. at 10. They also filed a complaint as next friend for their minor daughter seeking damages for loss of society, companionship, love and affection of her mother. *Id.* at 11. The trial court upheld the $142,000.00 jury verdict, but granted the defendant's dispositive motion on

the issue of the minor child's claims. The Court of Appeals affirmed the award, but reversed the trial court's ruling on the minor's claims. This Court, upon further review, affirmed the holding of the Court of Appeals. In fact, upon reading this case, the Court will be reminded of its prior holdings that seem to address and dispel several of the arguments made throughout the Defendant's Application.

For example, in addressing the concern for increased litigation, or burden on the Defendant, This Court stated, "[t]he rights of a new class of tort plaintiffs should be forthrightly judged on their own merits, rather than engaging in gloomy speculation as to where it will all end. *Id*. at 14-15, citing 82 Mich App 199, 210 [internal citation omitted].

Needless to say, this Court in *Berger* seemed to stand up for the proposition that even though a plaintiff's claim may also sound in alienation of affections, they may still proceed and recover if they have other valid causes of action. It may be true that but for MCL § 600.2901(1), Plaintiffs could have a second cause of action against the Defendant, but that statutory bar does not apply to their sole count of Negligence or Professional Malpractice.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs seek redress for the wrongs done to them by Defendant. Not only do they live with the scorn of being accused child abusers and molesters who engaged in incest and did terrible things to their own flesh and blood, but they have also lost their daughter. Even though the loss of their child is not actionable under current jurisprudence, the remainder of their claims must survive. What was done to them was wrong, and must be addressed.

As argued above, Plaintiffs have alleged that they were also patients of Defendant, and therefore the duty to them should flow naturally by virtue of the special relationship.

The reasoning within the Court of Appeals decision is sound. Allow for the cause of action to move forward and find a legal duty to exist here because it must. The very limited duty called for by the Court of Appeals addresses any countervailing policy considerations by establishing procedural safeguards. The safeguards are not new. The Court of Appeals merely reiterated that mental healthcare professions need to continue to practice under the exact same standard of care that they are currently required to do. No more, no less. The Court of Appeals loudly exclaims to all of these professionals, don't implant false memories, and you won't be sued for doing so. However, the Court of Appeals goes on to explain that even if a treatment modality resulted in the implantation of false memories of childhood sexual assault at the hands of the patient's parents, the professional is still insulated from liability if an expert agrees with the methods used by the Defendant, and if their use was within the standard of care. This is the exact same standard and defense utilized by every doctor, lawyer, accountant, etc. that is sued for professional negligence.

By finding a duty, and allowing third party plaintiffs that have been directly, proximately, and foreseeably injured as a result of the negligent practice of repressed memory therapy (or any

therapy),the ruling will help curb mental health abuses and will give redress to a class of verifiable victims. Public policy is best served by recognizing this cause of action, as a failure to do so only encourages reckless conduct on the part of some therapists.

Respectfully Submitted,

/s/ Zachary C. Kemp

Zachary C. Kemp (P71894)
Attorney for Plaintiff/Appellee
212 W. Highland Road, Suite 102
Highland, MI 48357
(248) 529-6849
zach@thekemplawfirm.com

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on January 6, 2016

By: □ U.S. Mail □ Fax
□ Hand Delivered □ Overnight Courier
□ Certified Mail x E-File and Serve

Signed: /s/ Zachary C. Kemp